



November 21, 2001

Ms. Ingrid Hansen  
Managing Director  
Legal Services Division  
General Land Office  
1700 North Congress Avenue  
Austin, Texas 78701-1495

OR2001-5408

Dear Ms. Hansen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155152.

The General Land Office (the "GLO") received three separate requests from the same requestor for the following information:

- 1) All documents associated with the land due east of Coastal Easement LC 20000007, including but not limited to any and all documents from or to the GLO from Landry's Seafood Restaurants, Inc., Summit Seafood, Inc. or Gaido's of Texas, Inc., or any associated entity of those organizations.
- 2) All documents associated with the determination on May 9, 2001 by Rosenda V. Molina that certain land in the vicinity of the LC 20000007 was dredged from private land.
- 3) All documents, to exclude easement agreements, associated with certain property on Galveston Bay, including but not limited to any and all documents from or to the GLO from Landry's Seafood Restaurants, Inc., Summit Seafood, Inc., or any associated entity of those organizations.

You claim that the majority of the requested information is excepted from disclosure under section 552.103 of the Government Code, and that portions of the information are excepted under sections 552.107 and 552.111, as well as under Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that some of the submitted records in Tab IV fall within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record . . . [.]

Gov't Code § 552.022(a)(1), (3), (17) (emphasis added). The GLO must release any requested information that falls within subdivisions (1), (3) or (17) of section 552.022(a), unless that information is expressly confidential under other law or is part of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body that is protected by section 552.108.

Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the interests of the governmental body and may be waived. As such, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 542 at 4 (1990) (stating that statutory predecessor to section 552.103 does not implicate third-party interests and may be waived by governmental body). Therefore, the GLO may not withhold the information in Tab IV that falls within the

scope of section 552.022 (see blue flags) under section 552.103, and it must be released, with the following exception.

We note that certain information contained within the documents to be released under section 552.022(a)(3) is protected by section 552.136. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act,<sup>1</sup> which makes bank account numbers confidential. Senate Bill 694 was passed on May 14, 2001, and became effective when it was signed by the Governor on May 26, 2001. It provides, in relevant part, as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). Thus, pursuant to section 552.136, you must withhold the bank account numbers that appear in the documents in Tab IV to be released under section 552.022(a)(3).

We will next address your argument under section 552.103 for the remaining information in Tabs IV and V. Section 552.103 provides as follows:

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<sup>1</sup>The Legislature also enacted two other bills that add a section 552.136 to chapter 552. House Bill 2589 makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 15 makes information maintained by family violence shelter centers confidential. *See* Act of May 3, 2001, 77th Leg., R.S., ch. 143, § 1, 2001 Tex. Sess. Law Serv. 279 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 694 also enacted the same language as House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (to be codified as Gov't Code § 552.137).

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The GLO has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the request for information was received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The GLO must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the requestor filled state-owned land without obtaining an easement from the GLO in violation of sections 33.111, 33.112, and 51.302 of the Natural Resources Code. You state that the requestor has been informed numerous times that an easement is required but that he has refused to comply. You further state that the GLO, therefore, referred the matter to the Office of the Attorney General ("Attorney General") for enforcement, and that you have submitted a copy of the letter seeking the Attorney General's assistance, dated February 1, 2001, as Tab III. We therefore conclude the GLO has established that litigation was reasonably anticipated on the date it received the requests for information. Upon review of the information submitted in Tabs IV and V(a)-(c), we also conclude that this information is related to the anticipated litigation. Therefore, the remaining information in Tabs IV and V(a)-(c) may be withheld under section 552.103(a),<sup>2</sup> with the following exceptions.

We note that some of the submitted information within Tab IV has been seen by the opposing party. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation

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<sup>2</sup>As we resolve your request for the information in Tab V under section 552.103, we need not address your arguments under section 552.107 or Rule 503 of the Texas Rules of Evidence for this information.

is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Further, we also have identified certain documents in Tab IV for which you have demonstrated the applicability of section 552.103, but which nevertheless are not excepted from required public disclosure. Section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). Thus, the GLO must release the deed and other real estate documents that are a matter of public record. We have marked this information with green flags. In addition, Tab IV contains newspaper articles that must be released to the requestor as they already exist in the public domain by virtue of their publication. We have marked these articles with yellow flags.

Next, you argue that the information you have submitted in Tab VI is excepted under section 552.111 as attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories.

Based upon your representations and our review of the submitted information in Tab VI, we find that both prongs of the work product test have been met and that the information you seek to withhold is attorney work product. Therefore, we conclude that the GLO may withhold from disclosure the information in Tab VI under section 552.111 of the Government Code.

To summarize, the GLO may withhold the requested information in Tabs IV and V(a)-(c) under section 552.103(a) with the following exceptions. Information coming within the ambit of sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(17), deed and other real estate records that have been obtained from public records, newspaper articles, and information seen by the opposing party in the litigation, must be released to the requestor. Pursuant to section 552.136, the GLO must withhold the bank account numbers that appear

in the documents to be released under section 552.022(a)(3). The information in Tab VI may be withheld under section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 155152

Enc. Submitted documents

c: Mr. Matthew Wiggins  
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(w/o enclosures)